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IN THE

Supreme Court of the United States

OCTOBER TERM, 1947.

No. 332.

THE COCA COLA COMPANY, *Petitioner,*

v.

SNOWCREST BEVERAGES, INC., *Respondent.*

On Petition for Rehearing of the Petition for a Writ of Certiorari to the Circuit Court of Appeals for the First Circuit.

Motion for Leave to File and Memorandum in Support of Petition for Rehearing as Amicus Curiae.

NATIONAL ASSOCIATION OF BROADCASTERS,

By its attorneys:
DON PETTY,
BRYCE REA, JR.,
IVAR H. PETERSON.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

IN THE

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SNOWCREST BEVERAGES, INC., *Respondent.*

Motion for Leave to File as Amicus Curiae Memorandum in Support of Petition for Rehearing of Petition for Certiorari.

Comes now the National Association of Broadcasters and moves the Court for leave to file, as amicus curiae, a memorandum in support of the petition for rehearing of the petition for certiorari in the above-entitled matter.

This case presents a question of importance to the entire membership of this Association which consists of more than 1,200 radio broadcast licensees located in all parts of the United States.

Attached to this motion is the memorandum in question. The Petitioner and the Respondent have been notified of this motion by the mailing to each of them of a full copy of this motion and of the memorandum.

Respectfully submitted,

NATIONAL ASSOCIATION OF BROADCASTERS,

By its attorneys:

DON PETTY,
BRYCE REA, JR.,
IVAR H. PETERSON.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1947.

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SNOWCREST BEVERAGES, INC., *Respondent.*

Memorandum in Support of Petition for Rehearing of Petition for Certiorari.

The National Association of Broadcasters, as amicus curiae, respectfully prays that the petition of the Coca-Cola Company for rehearing of its petition for a writ of certiorari to the Circuit Court of Appeals of the First Circuit be granted to review the decision and judgment of that Court in the above-entitled case.

The decision of the trial court, as affirmed on appeal, presents a federal question of outstanding importance.

According to that decision, the use of a trade name phonetically similar to a protected trade name will not be enjoined in the absence of proof by the plaintiff that the phonetic similarity has *actually caused* confusion on the part of the public in specific instances. This is contrary to the general rule which the court below itself stated as follows: ". . . the legal test of trademark infringement is the same as the legal test of unfair competition and basi-

cally that test is the *likelihood* of consumer confusion as to the source of the goods."[1]

In advertising in aural radio broadcasting, the value of a trade name depends entirely upon its distinctive sound since visual representation, of significance in advertising in newspapers, periodicals, signs, etc., is impossible.

The value of the exclusive right to the use of a trade mark or trade name is that through the expenditure of time, effort and money by its owner, it becomes the means of identifying the commodity with which it is associated in the minds of consumers. This identification is created almost entirely by advertising, and much of the advertising reaches consumers through their ears alone. This is illustrated by the fact that in the year 1946 advertisers spent some $424,000,000[2] in aural radio broadcasting, most of it for the purpose of familiarizing the public with their exclusive trade marks and trade names.

It follows that to refuse to protect the distinctive sound of a trade mark or trade name is to deprive its holder of the very essence of his property, namely, his exclusive right to its use, thereby impairing, and in many cases, destroying, its value.

To refuse to extend the same degree of protection to representation by sound as to representation by sight is to place radio broadcasting, as an advertising medium, at a serious, unfair competitive disadvantage with other media.

Respectfully submitted,

NATIONAL ASSOCIATION OF BROADCASTERS,

By its attorneys:

DON PETTY,

BRYCE REA, JR.,

IVAR H. PETERSON.

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[1] 162 F. (2d) 280, 283 (italics supplied).

[2] "An Economic Study of Standard Broadcasting", Report of the Federal Communications Commission issued October 31, 1947, Table A-1, p. 99.